**THE HON'BLE SRI JUSTICE P.S.NARAYANA**

**Writ Petition Nos.14022/05, 2236 & 10481 of 2006**

**Date: 12th December, 2007**

Between :-

W.P.No.14022/2005:-

V. Balaji .. Petitioner

And

Divisional Railway Manager,
Works Branch, South Central Railway,
Vijayawada and 3 others .. Respondents

W.P.No.2236 of 2006:_

V. Balaji .. Petitioner

And

Union of India represented by
General Manager,
South Central Railway, Secunderabad
And 4 others .. Respondents

W.P.No.10481/2006:-

V. Balaji .. Petitioner

And

Divisional Railway Manager,
Works Branch, South Central Railway,
Vijayawada and 3 others .. Respondents

**THE HON'BLE SRI JUSTICE P.S.NARAYANA**

**Writ Petition Nos.14022/05, 2236 & 10481 of 2006**

**COMMON ORDER:-**

These three Writ Petitions are being disposed of by common order in view of the commonality of facts and also the parties being common.

2. Smt. Sesharajyam, the learned Counsel representing the writ petitioner in all these Writ Petitions had demonstrated before this Court several arithmetical calculations and also had pointed out to several proceedings and would maintain that these were made in violation of principles of natural justice, behind the back of the writ petitioner. The learned Counsel also would submit that though no suitable directions as such can be given in W.P.No.2236/06, if appropriate directions are not given, in future, while considering the case of the writ petitioner, this will taken as a stigma and hence, appropriate directions may be given. The learned Counsel also had pointed out how the issue had been prejudged and how after coming to a conclusion, the other formalities subsequently had been complied with and hence it is a clear case of violation of principles of natural justice in the light of the prejudging of the issue. The learned Counsel also pointed out that as far as the amount of Rs.75,000/- is concerned, there is no serious controversy between the parties and hence, the refund of the same may be ordered. The learned Counsel while elaborating her submissions in relation to the other two Writ Petitions W.P.No.10422/05 and 10481/06 would maintain that the writ petitioner in fact was forced to sign

and no notice was issued for joint inspection and the petitioner was not present at the time of measurements and it is the stand taken by the Railways that the petitioner was informed on phone and the same was not recorded even in the proceedings and that the general conditions of the contract also had been violated. The learned Counsel also pointed out to the relevant portions of the record and would maintain that the stand taken in the counter affidavits cannot be sustained. This action appears to have been initiated on an anonymous complaint. The Counsel also had pointed out to the relevant portions of the counter affidavits and would maintain that the railways had taken a false stand the summoning of the writ petitioner at late night of about 8.00 pm., on the fateful day had taken a giving notice, after the final bill had been settled, there is no question of approaching the arbitrator. The learned Counsel also pointed out to the alleged CBI Officials' inspection and this was done in the absence of the petitioner. The learned Counsel also would maintain that despite the directions made by this Court, no proper details had been furnished even thereafter. The learned Counsel also had taken this Court through the order made by this Court in W.P.No.3020/2006 and further would comment that dismantling is not the subject matter of this contract and no doubt in one matter, there was a request to refer the matter to the arbitrator, but in other matter no such request had been made. In the absence of reports, the writ petitioner cannot be fastened with the liability and in the light of the same, these Writ Petitions are to be allowed.

3. On the contrary, Sri Ganga Rami Reddy, the learned standing Counsel representing respondents-Railways would maintain that in the light of the subsequent changes in a way the Writ Petition W.P.No.2236/06 became infructuous. Even otherwise, show cause notice was issued, the statement of charges had been specified and further the Counsel would contend that in the prior Writ Petition, interim stay was granted and the same was vacated, the procedure was followed and there is no prejudging of issue, inasmuch as, at the best, this can be a inter-departmental correspondence, even otherwise, when a higher Officer taken a decision, this may not seriously alter the situation. The learned Counsel also would maintain that let the petitioner make an application in accordance with law and let the competent authority consider the case of the petitioner whether the petitioner can be kept in the list or not in the facts and circumstances. Hence, no orders need be passed in the Writ Petitions. While further elaborating his submissions in relation to the other Writ Petitions W.P.No.10422/05 and 10481/06, the Counsel pointed out to the order made in W.P.No.3020/06 and would maintain that reasons had been recorded and certain particulars also had been furnished. The learned Counsel also would submit that the writ petitioner signed in the report and the petitioner accepted discrepancy and hence, the petitioner cannot complain about the remittance again, having paid the amount, the petitioner cannot question the same again in W.P.No.10422/05. The Counsel also had referred to the relevant arbitration clauses and would maintain

that the remedy by way of Writ Petition in a statutory contract like this is a misconceived remedy. Either the writ petitioner may have to approach the Civil Court or may have to invoke the arbitration clause. The learned Counsel also placed strong reliance on several of the decisions to substantiate his submissions.

4. Heard the Counsel and perused the material produced before this Court.

5. W.P.No.2236/06 is filed for issuance of *Writ of Mandamus declaring that the Memo.B/W.496/I/4/ALC/Tenders, dated 6-1-2006 (in Form-I) issued by the 4th respondent i.e., Divisional Railway Manager, S.C.Railway, Vijayawada, where under the name of the petitioner was removed from the list of approved contractors for a period of 5 years with effect from 6-1-2006 as illegal, improper, arbitrary, without jurisdiction, opposed to principles of natural justice and unenforceable and pass such other suitable orders.*

6. This Court issued *rule nisi* on 7-2-2006 and granted interim suspension in W.P.M.P.No.2722/06.

7. It is averred by the petitioner that *he had been executing civil works of South Central Railways for the last 5 years, without any complaint from any quarter and that he was enlisted in the list of Approved List of Contractors in Category III Class B in 2004 upto 30-6-2007. It is also stated that in June 2004, the 5th respondent had called for tenders relating to the work of repairs to Sewage Pumping Main from Drainage Pump House to Septic Tanks along with Type 1 Quarters 132 to 137 and Type III*

*Quarters 119 to 121 at W/WS/Railway Colony Rayanpadu and that the petitioner offered his tender on 21-7-2004 and that the 5th respondent had called for negotiations on 17-11-2004 and tender quotation amount was reduced during negotiations and that ultimately, the petitioner's tender was accepted by the proceedings No. B/W.496/1/4/T.81/DEN/I/2004/T.V. dated 30-11-2004 and the agreement was executed on 4-1-2005. Further it is stated that there are special and general conditions of contract binging both the parties and that the agreement period was three months with maintenance period of 6 months and the actual work commenced on 4-2-2005. Further it is averred that the petitioner had executed the entire work and extra work also as per the instructions of the Departmental Officials and that the final measurements were taken by the representatives of the 5th respondent i.e., Senior Section Engineer (Works) Rayanapadu. Further it is stated that after all the measurements were taken and certified in all respects only the final bill was approved and payments were made after due check measurements were made by the Asst.Divisional Engineer and Sr.Divisional Engineer Coordination and also stated that the 5th respondent also certified the work as per clause 1355(ii) of Engineering Code regarding Technical aspects of the work. It is also averred by the petitioner that to his surprise and annoyance, he was called to the office of the S.S.E./W(W.A.)/Rayanapadu on 29-5-2005 at about 8,00 p.m., by the 4th respondent where he found Divisional Engineer East*

*BZA and A.D.E./BZA and he was asked to sign a Special Investigation Report stating that there was some discrepancy regarding the work executed by him in laying the Pipe Line and there were some excess payments made and that he brought it to the notice of the respondent No.5 that he was not present when they have conducted inspection, no notice was given to him and he cannot be made responsible for the inspection made behind his back that too after the entire work was executed and certified by the Department Officials. It is also averred in para 5 that inspite of protest, the respondent No.5 and the other officials present have forced the petitioner to sign report stating that the recovery would be subject to further inspection etc. It is also stated that the petitioner had been executing other works of the Department and heavy amount of bills and works are pending with the department and that the petitioner had no other go to sign the report and pay the amount as demanded by them on the assurance that the matter would be only regarding excess payments and subject to further inspection. The petitioner also further stated that after the receipt of amount, the 5th respondent had issued proceedings No.B/W/148/I/8095/WA Coord., dated 30-5-2005 received by him on 3-6-2005 calling upon him to pay an amount of Rs.6,01,248/- which has been paid in excess of the works executed by him and also stated that the amount is only provisional. It is also stated by the petitioner that an investigation has been done on the work entrusted to him by a Committee of Officers in his presence on 28-5-2005 and 29-5-*

*2005 which is not correct and also stated that he was never given a notice of any appointment of any Committee or the so-called Investigation by the Committee and that he was never present on 28-5-2005 or on 29-5-2005 at the time of any investigation. In fact, as per the General Conditions of the contract (condition No.4) all notices and communications references and complaints made by the Railway or the Engineers representative or the Contractor, interse concerning the works shall be in writing and no notice communication, reference or complaint not in writing shall be recognized. Further it is stated by the petitioner that every step of work i.e., measurement, certificates, payment etc., was governed by the General and Special condition of the contract, in his case also entire process was carried out as per the conditions of the contract. It is also stated that as the action of the respondents in conducting Review (reopen/Inspection/enquiry/Investigation) was unilateral, behind back of the petitioner, without giving any notice, without jurisdiction. The petitioner filed W.P.No.14022/2005 before trial Court. The petitioner also alleged that the respondents have given departmental instructions to all Wings not to accept any Tender from him, not to settle pending bills. It is also stated that when the matter came up before this Court after notice on 21-7-2005 the learned standing Counsel for Railways had represented to this Court that "no instructions have been issued to stop the amount due to the petitioner and the petitioner is not prevented from participating in any recorded tender or from executing any other*

*work" and the same is recorded. The petitioner further averred that after a lapse of about 20 or 30 days, the bills kept pending in Divisional Office were paid to him but certain bills were stopped at ADEN's Office/SSC/W/Office without sending them to Division Office. Further it is stated that the respondents have filed their counter affidavit in the above said Writ Petition stating that the petitioner had got a remedy of invoking the arbitration clause No.63 and 64 of General Conditions of Contract. Further it is stated that the respondents have issued another memo calling upon the petitioner to pay an amount of Rs.26,082/- as interest on the amount of Rs.6,10,248/- already collected under pressure and coercion and the same is subject matter of the above said Writ Petition and that the amount of Rs.26,082/- was deducted from him on account bill in respect of Agrt.No.5/BZA/C/05, dated 19-1-2005. In para 10 of the affidavit the petitioner stated that:*

> *"I submit that while the matters stood thus, I was served with a Memorandum dated 15-7-2005 in Form No.1 on 15-7-2005 proposing to remove my name from the list of approved contractors and I was given time up to 22-8-2005 to submit any representation against the proposed action. I submit that a statement of charges/Misconduct is enclosed to the said memo dated 15-7-2005 in which it is stated that a post payment audit was conducted under clause 51(2) OF General Conditions of Contract by a Committee of Officers consisting of DEN/East BSA and ADEN/Bldgs/BSA under the supervision of Sr.DEN/Coord/BZA as proposed by Sr.DEN/Co.ord/BZA with the approval of DRM/BZA in the presence of SSE/Works/WA/RYP and SE/Works/BZA and Special Report is drawn. It is alleged that measurements recorded*

*are more than the quantities executed and regarding certain items of works the work was not at all executed. It is also alleged that I have accepted the discrepancies. It is submitted that the very inspection report itself is the subject matter of W.P.No.14022/2005 and the same is pending. I submit that the respondents are relying on the conditions of contract for fastening the liability on me under the guise of Post Payment Audit. As already submitted that the very special and General condition of the contract specifies that all correspondence between the Contractor and the Railway should be in writing and communication which is not in writing is of no value. I submit that no measurements were taken in my presence, no notice was given to me at any point of time. I submit that clause 51(2) reads as follows: Post Payment Audit:- "It is an agreed term of contract that the Railway reserves to itself the right to carryout a post-payment audit and technical examination of the works and the final bill including all supporting vouchers, abstracts, etc., and to make a claim on the contractor for the refund any excess amount paid to him, if as a result of such examination any over-payment to him is discovered to have been made in respect of any works done or alleged to have done by him under the contract." I submit that clause 51(2) itself is silent when the Audit/Inspection can be carried out, by whom and the period before which such exercise can be undertaken and who has to do it. I submit that clause 51(2) of General Condition of the contract is liable to be declared as bad in law as it confers unguided and unlimited power on the officials concerned. In my case, 5th respondent who is associated with the work, who is part of misconduct if any as the entire work is carried out under his supervision and issued necessary satisfaction certificates cannot constitute a committee with all his subordinates to fasten the responsibility against an innocent contractor. I submit that the officers associated with Inspection report are all*

*subordinates to the 5th respondent and they are also associated with the works. The witnesses are subordinates to the so-called Inspecting Officers. I submit that the 5th respondent in a hurry to save himself has hurriedly drawn of a report through his subordinates and made me to sign under pressure. I submit that under the GCC the contractor who signs no claim certificate on the final bill has no right for raising any dispute either regarding payment/work executed or even to raise a dispute for arbitration. But the respondents have reserved their right to examine the work at any time and right to recover money at any time and the said clause itself is bad. Even otherwise if any such discrepancy is found, they are entitled only for recovery of the amount and the same cannot be made ground for taking penal action. I submit that the respondents cannot take penal action against me without waiting for invoking the arbitration clause and result thereof. I submit that though the respondents have issued notice now for removing my name from the list of approved contractors, the action is proposed by the 4th in May 2005 itself which shows the pre-concluded mind of respondents 4 and 5. Simultaneously, along with the recovery of money and the same is evident from various correspondence filed along with Writ Petition. I submit that the 4th respondent cannot act on the note and the action proposed by the 5th respondent who is part of the agreement and associated with the execution of work certificates and payment of final bill. I submit that the 4th respondent is shielding the 5th respondent who is responsible for the excess payments or wrong measurements recorded in M.Book etc."*

*Further it is stated that there were many complaints regarding other works executed by other contractors under the supervision of the 5th respondent and as a preventive measure*

*for action against him, he has reopened works executed by innocent contractor like the petitioner. The petitioner also stated that the 5th respondent had written to all Departments that his name has already been deleted from the approved list of contractors along with 4 others and given instructions to all the Departments by his note dated 23-6-2005 and also stated that the memo issued by the 4th respondent is only at the behest of 5th respondent who cannot be associated with Post-Audit Inspection as against his certification. Further it is stated that 5th respondent is the person responsible for any discrepancies, irregularities in taking measurements, certifications payment etc., if he is permitted to be associated with taking action, it amounts to allowing him to sit in Judgment against himself. Further it is stated that excess payments made to the petitioner even it is admitted for arguments sake having opted for recovering the same subject to further orders cannot take penal action against him and also stated that though the Memo is issued in the name of the 4th respondent and it is shown as if the opportunity is given to the petitioner, it is only a formality and the decision is taken long back by the 5th respondent himself and it is circulated to all departments stating that it is proposed to block list the petitioner and 4 others for which proposal shall be sent to Headquarters and also further stated that having regard to the above stated facts, no purpose would be served in approaching the respondents with an explanation/representation. It is also stated that turning the discrepancy even if it is noticed as misconduct and issuing a*

*charge memo is not authorized and the petitioner cannot be treated as the employee of the respondent and also stated that the misconduct if any has to be attributed to all Officers who are connected to the work and not to the contractor. The petitioner further stated that the respondents have already decided to remove his name from the list of contractors and proposal even before issuance of show cause notice to block-list his name and the same amounts prejudging the issue without allowing him to avail to his remedies available and that when his name has already been removed from the list of approved contractors as per the Departmental Instruction going before the 4th respondent with a representation would of no use and hence he filed W.P.No.18092/2005 before this Court and this Court was pleased to admit the Writ Petition and granted interim suspension of the show cause notice and the respondents have filed counter affidavit and vacate stay petition and the matter came up on 26-12-2005 and when the case came up, his Counsel could not be present as she was engaged in the other case and this Court was pleased to pass orders vacating the interim orders in the absence of his Counsel and that on coming to know of the same, he had filed an application to set aside the exparte orders but by the time the matter came up before this Court, 4th respondent had already passed orders in proceedings No.B/W 496/1/4/ALC/Tenders dated 6-1-2006 removing his name from the approved list of contractors operating Engineering Department Vijayawada Division from all classes and categories for a period of 5 years with effect from 6-*

*1-2006. It is also stated that no reasons are given for passing the order except stating that this Court was pleased to vacate the interim order. The petitioner also stated that as his Counsel was not present, the interim stay was vacated but the case is not decided on merits. Even otherwise, the 4th respondent is bound to given reasons. It is also stated that by the petitioner that the right accrued to him cannot be taken away by a non-speaking order by authority who is not competent to do so and also averred that as he is the person associated with the works, he had raised the ground that he should not have been associated with the issue and has no jurisdiction also as the inclusion of his name in the approved list is by the 5th respondent. Further the petitioner averred that on receipt of order dt.6-1-2006, he made a representation that his Writ Petition is still pending and he had filed an application to set aside the exparte order and the order dt.6-1-2006 cannot be given effect till the disposal of his case in this Court and further stated that the order of the 4th respondent is illegal, improper, arbitrary without jurisdiction besides being opposed to principles of natural justice and is liable to be set aside. It is also stated that as the respondents have stated that the subject matter of excess payment has to be settled through arbitration, the petitioner requested the authorities to refer the matter for arbitration including the competency of the 5th respondent to constitute a committee and the said committee submitting a report without any inspection and drawing up a report and making the petitioner to sign on the report using pressure,*

*coercion etc., as the action of the respondents is without jurisdiction and opposed to principles of natural justice. In such circumstances, the writ petitioner approached this Court praying for appropriate reliefs.*

8. In the counter affidavit filed by respondents 1 to 5, the same was sworn to by the Senior Divisional Engineer (Co-ordination), South Central Railway, Vijayawada, and it is averred that it is a fact to the petitioner had executed the work in the Vijayawada Division and that the execution of work was done under the direct supervision of Senior Section Engineer/Works/Watering Arrangements/ Rayannapadu and also with monitoring and checking by Assistant Divisional Engineer/Buildings, South Central Railway, Vijayawada. Sri K.Venkateswara Rao, Senior Section Engineer/Works/Watering Arrangements/Rayannapadu recorded the measurements for the work in question. The check was carried out in all the contract works executed in the jurisdiction of Senior Section Engineer/Works/Watering Arrangements/Raynapadu. The work referred in the present is one of the works checked in this manner. The measurements have been certified as technically checked by the Chief Draftsman of the Works Branch, Vijayawada. During the check, the petitioner was also very must present and other witnesses Sri B.Timothy, Section Engineer/Works/Vijayawada was also present. The special report on the verification conducted on 28-5-2005 and 29-5-2005 pertains to the contract in question. On verification of the said work, it is found that the petitioner has been paid an excess

amount of Rs.6,01,248/- over and above the work done by him for the works not actually executed by him. Hence, the respondents are entitled to recover the said amount from the petitioner. Further, it is stated that it is not mandatory on the part of the respondent No.5 to carry out complete check of the measurements or test check the measurements for the above said contract. It is stipulated that in respect of works costing Rs.25 lakhs and above, respondent No.5 is required to exercise a test check of 5% and the test check was carried out appropriately. Further, it is to be brought out that wherever test check has been carried out, the work was found to be proper. Further, the respondent No.5 is the Head of the Engineering department at Divisional Level (i.e., Vijayawada Division). Senior Divisional Engineer/Co-ordination is basically in charge ofman power management, Planning, Budget, Expenditure Control etc., apart from this, he is required to co-ordinate both at Divisional Level as well as at Head Quarters level for functioning of the Engineering department as a whole, while other Senior Divisional Engineer/Divisional Engineers are fully responsible for the proper maintenance of way and works in the respective Sections allotted to them. Hence, the allegation that the respondent No.5 is directly responsible for the execution of any individual work is unfounded and not correct. The recording official i.e., Sri K.Venkateshwara Rao, Senior Section Engineer/Works/Watering Arrangements/Rayanapadu is directly associated with the execution of the work by the petitioner or his representative and he has abdicated his duty to safeguard the

interests of the Railway. As he colluded with the petitioner and recorded the measurements from certain items of works not actually executed by the petitioner for Rs.6,01,248/-, he is kept under suspension w.e.f. 30-5-2005. Further the petitioner, if he had any objection for the present of any officer, ought to have objected for it. However, he did not choose to do so. It also stated that there is no substance in the petitioner's allegation that the bills were kept pending at Section Engineer (Works) Offices and Assistant Divisional Engineer Offices. It is also further averred that it has been established by the nominated committee of officers in the present of petitioner that over payment of Rs.6,01,248/- was made further work actually not executed by him. As it is the public money, all the safeguards have to be taken to protect the same. Accordingly, an amount of Rs.26,082/- has been arrived towards interest on Rs.6,01,248/-. The demand for interest is not illegal. Since, it is public money, which has to be handled with prudence, interest has to be charged at the rate of 18% per annum in terms of Engineering Code E-1264(e)(i) and the interest has been arrived at Rs.26,082/-. In terms of clause No.52 and 52(a) of General Conditions of Contract, Railways can withheld the payments if any due to him from any other contracts. It is also stated that subject contract work is governed by the General Conditions of Contract by which both the parties to the contract are bound by law. The General Conditions of Contract is derived from Contract Act, Clause 51(2) of General Conditions of Contract therefore has the sanctity of law of the land.

Therefore, repudiating or belittling of the said clause is not correct. The post payment audit has the sanction of this clause and there is no limitation of time under this clause to initiate action. Therefore, the action taken by the respondents is just and in order. As a deterrent to other contractors and also to safeguard the Railways interest which is owned by the public, the action proposed to be taken by the issuance of the Memorandum dated 15-7-2005 in Form No.1 is just and correct.

It is a fact that mention was made in the internal official note No.B/W.Co-ordination/Confidential dated 23-6-2005 of 5th respondent in regard to deletion of five contractors including the petitioner from the approved list. It is further stated that in terms of Railway Board letter No.94/CE-I/CT/4, dt.17-10-2002, a committee of officers i.e., Senior Divisional Engineer, Coordination and Senior Divisional Finance Manager, duly approved by the Divisional Railway Manager can delete a contractor from the approved list of contractors. As the five contractors whose names indicated in the internal officla note No.B/W.Co-ordination/Confidential dated 23-6-2005 referred by the petitioner have committed gross irregularities while executing the contract works and proposals were initiated for deletion of the said contractor's name from the approved list. In continuation, the show cause notice under Memorandum dated 15-7-2005 (form-I) was sent to six contractors who indulged in malpractice/irregularities in execution of the contract works entrusted to them. They were given time upto 22-8-2005 to submit their representations if any and consideration of the

same, their names have not been deleted. The contention of the writ petitioner that the action for deletion of names from the approved list of contractors was done with a pre-concluded mind since May 2005, is baseless since the fraudulent means of execution of contract works has come to light only in the month of May 2005 during the investigation of the works. It is also stated that fraud was committed by the field Railway Supervisory Officials and the contractors including the petitioner in the execution of the certain contract works harming the interest of Railways and therefore, the action initiated is just and fair and thus, the memo issued by the 4th respondent is in order and in accordance with the rules and regulations. Further it is stated that the petitioner had admitted the fact of excess payment for the work not actually executed by him and remitted excess amount of Rs.6,01,248/- by way of Demand Draft dated 31-5-2005 to Railways. The remittance of amount to Railway of the excess payment by the petitioner, does not absolve the petitioner of wrong doing in carrying out the execution of the work. The allegations of the petitioner that the memo issued by the 4$^{th}$ respondent is only a formality and the decision is taken long back by the 5th respondent himself and it is circulated to all the departments are totally baseless and false and also stated that no such instructions were given to any department. Further it is stated that as per the procedure in vogue on this railways, a list of approved contractors is prepared by taking into consideration of their past performance and experience on the works executed by them. In this connection, there are Railway

Board Instructions issued under letter No.94/CE-1/CT/4, dated 17-10-2002 that a Committee of Officers duly approved by Divisional Railway Manager can delete a contractor from the approved list of contractors. Further it is stated that this Court was pleased to passed stay vacation orders by order dated 26-12-2005 in W.V.M.P.No.2559/05 in W.P.M.P.No.23030/05 in W.P.No.18092/05. It is also stated that even after the stay vacation orders, the petitioner had not submitted any explanation. Accordingly, the 4th respondent had taken further action, since the petitioner had not made any representation. It is also stated that the deletion of the petitioner name from the approved list of contractors by the 4th respondent is in accordance with the rules and regulations. The Writ Petition filed by the petitioner is devoid of merits and the petitioner is not entitled to any relief prayed for in the Writ Petition and accordingly, the Writ Petition is liable to be dismissed.

9. W.P.No.14022/2005 is filed praying for *a Writ of Mandamus declaring the action of the respondents in issuing proceedings No.B/W.148/I/8095/WA/Co-ord, dt.30-5-2005 issued by the 2nd respondent and consequential instructions against the petitioner as illegal and unenforceable and consequently direct the respondents to refund the amount of Rs.6,01,248/- and pass such other suitable orders.*

10. The order impugned dt.30-5-2005 reads as hereunder:-

***SOUGH CENTRAL RAILWAY***

*No.B/W.148/I/8095/WA/Co-ord. Office of the Divl. Divl.Rly.Manager, (Works) Vijayawada.*

*Dt.30-5-05.*

*To*
*Sri V.Balaji,*
*Railway Contractor,*
*Door No.2-283/3,*
*College Road,*
*Vuyyuru – 521 165.*

*Sir,*

*Sub:- Rayanapadu – repairs to sewage pumping main from drainage pump house to septic tanks along with Type-I Qrs.no.132 to 137 and Type-III Qrs.No.119 to 121 at WWS/Railway Colony/RYP.*

*Ref: This office acceptance letter No.B/W.496/I/4/T.81/DEN/I/2004/T.V.,dt.30-11-04, Agt.No.5/Sr.DEN/Co-ord./BZA/05, dt.4-1-05.*

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*The above work was awarded to you for a total value of Rs.27,26,569/- (Rupees twenty seven lakhs twenty six thousand, five hundred and sixty nine only). The Final Bill has been passed for this work including deviation amounting to Rs.39,13,580/- (Rupees thirty nine lakhs thirteen thousand five hundred and eighty only) duly arranging payment to you.*

*An investigation has been done on the above work by a Committee of Officers consisting obtained DEN/East/BZA and ADEN/Buildings/BZA in the presence of Sri K.Venkteswara Rao, SSE/WA/RYP., and Sri Thimothy, SE/Works/BZA and yourself on 28-5-05 and 29-5-05. A Special Report made in this regard has already been signed by you as Witness on 29-5-05. It is established based on the investigation that, approximately an amount of Rs.6,01,248/- (Rupees six lakhs one thousand two hundred and forty eight only) has been paid in excess for the work not executed by you. This amount is only provisional.*

*You are hereby advised to remit an amount of Rs.6,01,248/- (Rupees six lakhs one thousand two hundred and forty eight only) to the Railways immediately in the form of D.D/Money Cash Receipt, in favour of Sr.DFM/S.C.Rly/Vijayawada, chargeable to Allocation 11-561-32. (Spending Unit 05).*

*Please treat this as MOST URGENT.*

*Yours faithfully,*

*Sd/-*
*Senior Divl.Engineer (Co-ord)*
*S.C.Rly, Vijayawada,*
*For and on behalf of the President of India.*

11. This Court issued *rule nisi* on 21-7-2005 in this matter.

12. It is stated in para 2 of the affidavit filed in support of the Writ Petition that *the petitioner has been executing Civil Works of South Central Railways for the last 5 years, without any complaint from any quarter and the petitioner was included in the list of Approved Contractors in Category B in 2004. Further it is stated that in June 2004, the 1st respondent had called for tenders relating to the work of repairs to sewage pumping main from drainage pump house to septic tanks along with Type-I Qrs.no.132 to 137 and Type-III Qrs.No.119 to 121 at W/WS/Railway Colony Rayanapadu and that the petitioner offered his tender on 21-7-2004 and also stated that that the 1st respondent had called for negotiations on 17-11-2004 and tender quotation mount was reduced during negotiations and that ultimately, the petitioner's tender was accepted by the proceedings No.B/W.496/I/4/T.81/DEN/I/2004/T.V. dt.30-11-04, and the agreement was executed on 4-1-2005. It is also stated that there are special and general conditions of contract binding both the parties and that the agreement period was three months with maintenance period of six months and that the actual work commenced on 4-2-2005. It is also averred that the petitioner had executed the entire work and extra work also as per the instruction of the departmental officials and that the final*

*measurements were taken by the representatives of the 1st respondent i.e., Senior Section Engineer (Works)Rayanapadu. Further it is stated that after all the measurements were taken and certified in all respects only the final bill was approved and payments were made after due check measurements were made by the Asst.Divisional Engineer and Sr.Divisional Engineer Coordination. Further it is stated by the petitioner that to his surprise and annoyance, he was called to the office of the 3rd respondent on 29-5-2005 at about 8.00 p.m., by the 2nd respondent where he found respondents 3 and 4 Divisional Engineer East BSA and Section Engineer Works/BZA and he was asked to sign a special investigation report stating that there was some discrepancy regarding the work executed by him in laying the pipe line and there were some excess payments made and that he brought it to the notice of the respondents that he was not present when they have conducted inspection, no notice was given to him and he cannot be made responsible for the inspection made behind his back that too after the entire work was executed and certified by the Department officials. It is also averred that inspite of protest, the respondents and the other officials present have forced the petitioner to sign report stating that the recovery would be subject to further inspection etc., and that he had no other go to sign the report and pay the amount as demanded by them on the assurance that the matter would be only regarding excess payments and subject to further inspection. Further it is stated that after the receipt of amount the 2nd respondent had issued*

*proceedings No.B/W/148/I/8095/WA Coord, dated 30-5-2005 received by the petitioner on 3-6-2005 calling upon him to pay an amount of Rs.6,01,248/- which has been paid in excess of the works executed by him and further it is stated that the amount is only provisional. It is also averred that an investigation has been done on the work entrusted to the petitioner by a Committee of Officers in his presence on 28-5-2005 and 29-5-2005 which is not correct and that the petitioner was never given a notice of any appointment of any Committee or the socalled investigation by the Committee and that the petitioner was never present on 28-5-2005 or on 29-5-2005 at the time of any investigation. In fact, as per the General conditions of the contract (condition No.4) all notices and communications references and complaints made by the Railway or the Engineers representative or the Contractor, inters concerning the works shall be in writing and no notice communication reference or complaint not in writing shall be recognized. It is also stated that every step of the work i.e., measurement, certificates, payments etc., was governed by the General and Special conditions of the contract, in the case of the petitioner also entire process was carried out as per the conditions of the contract. It is also averred that the action of the respondents in conducting review/reopen investigation/enquiry/inspection unilaterally behind the back of the petitioner without giving any notice is illegal, improper, arbitrary, besides being opposed to principles of natural justice. Even in the proceedings dt.30-5-2005 it is stated that the*

*amount arrived by respondents as excess payment is only provisional which itself shows that the impugned is not complete and the arriving at the amount without full Inspection/Impugned is illegal and also stated that after the entire work is executed and certified, the respondents have no authority to inspect the work in the absence of the contractor and fasten the liability on the contractor. Further it is averred that the action of the respondents in issuing proceedings dt.30-5-2005 in proceedings No.B/W.148/I/8095/WA/Co-ord. is liable to be set aside as it is without jurisdiction and opposed to principles of natural justice. It is also averred that the respondents are not entitled to interfere with the works in the other Divisions of the 1st respondent they have given Departmental instructions not to accept any tenders from the petitioner and not to process the Bills of the petitioner and also stated that the petitioner came to know that the respondents have made some other contractors also by force in order to cover up their Departmental lapse.* In such circumstances, the petitioner approached this Court praying for appropriate reliefs as specified supra. The impugned order already had been referred to above.

13. The Senior Divisional Engineer (Co-ordination), South Central Railway, Vijayawada, Krishna District, had sworn to the counter affidavit. Specific stand had been taken that *the Writ Petition is not maintainable inasmuch as Union of India represented by General Manager, South Central Railway, Secunderabad was not shown as a party and in the absence of the same, the Writ Petition is liable to be dismissed on this*

*ground alone. Further the writ petitioner has to invoke the arbitration clause No.63 and 64 of General conditions of Contract and cannot approach the High Court under Article 226 of the Constitution of India. It is further stated that it is a fact that the petitioner had executed works in this Division and that on verification of the work carried out by the petitioner by Railways through a Committee of Officers formed by respondent No.1 i.e.., Divisional Railway Manager, South Central Railway, Vijayawada, the irregularities in the above said contract came to light, resulting in payment to the contractor for certain items of work which were not physically carried. The enquiry was conducted in the presence of the writ petitioner on 28-5-2005 and 29-5-2005 and the Special Report was signed by the petitioner and also stated that the petitioner accepted the non-execution of the work and paid the excess amount of Rs.6,01,248/- by way of Demand Draft dated 31-5-2005. It is also stated that the allegations that the writ petitioner was not present at the time of inspection and the inspection was done behind the back are all false and incorrect. Further it is averred in para 5 counter affidavit that the contention of the writ petitioner that he was not present on 28-5-2005 and 29-5-2005 is not correct and also further stated that the writ petitioner was very much present and signed the Special Report on 29-5-2005. As per clause 51(2) of General conditions of Contract post payment audit is an agreed term of the contract that the Railways reserve right to carryout the post payment audit and or technical examination of the works and the final bill including all*

*supporting vouchers, abstracts etc., and to make a claim on the contractor for the refund of any excess amount paid to him if as a result of such examination any over payment to him is discovered to have been made in respect of any works done or alleged to have been done by him under the contract. The investigation has been done by the Committee of Officers in the presence of the writ petitioner and that the writ petitioner was informed over phone regarding post payment audit on 28-5-2005 and 29-5-2005 and he presented himself and witnessed the measurements which were checked by the Committee and accepted the discrepancies in the measurements recorded in Measurement Book and signed the special report. It is also stated that the execution of work was done under the direct supervision of Senior Section Engineer/Works/Watering Arrangements/Rayanapadu and also with monitoring and checking by Asst.Divisional Engineer/Buildings, South Central Railway, Vijayawada. The measurements for this work were recorded by Sri K.Venkateswara Rao, Senior Section Engineer/Works/Watering Arrangements/Rayanapadu. Further it is stated that the check was carried out in all the contract works executed in the jurisdiction of Senior Section Engineer/Works/Watering Arrangements/Rayanapadu and that the work referred in the present case is one of the works checked in this manner and that the measurements have been certified as technically checked by the Chief Draftsman of the Works Branch, Vijayawada and that during the check, the petitioner was also very much present and other witnesses Sri*

*B.Timothy, Section Engineer/Works/Vijayawada was also present. The Special Report on the verification conducted on 28-5-2005 and 29-05-2005 pertaining to the contract in question. On verification of the said work, it is found that the petitioner has been paid an excess amount of Rs.6,01,248/- over and above the work done by him for the works not actually executed by him. Hence, the respondents are entitled to recover the said amount from the petitioner. Further it is stated that it is not mandatory on the part of the respondent No.2 to carry out complete check of the measurements or test check the measurements for the above said contract and it is stipulated that in respect of works costing Rs.25 lakhs and above, a test check of 5% shall be exercised by respondent No.2 and entries to this extent have been made appropriately in the Measurement Book No.574/05. Further, it is to be brought out that wherever test check has been carried out, the work was found to be proper. Further it is stated that the recording official i.e., K.Venkateswara Rao, Senior Section Engineer/Works/Watering Arrangements/Rayanapadu is kept under suspension w.e.f.30-5-2005, who recorded the measurements for certain items of works not actually executed by the contractor for Rs.6,01,248/-. Further it is stated that the action taken is not unilateral. This was done only after the examination as a part of the post payment audit done in the presence of the petitioner. The principles of natural justice have not been violated since the investigation/post payment audit has been done in the most transparent manner and in the presence*

*of the petitioner as well as the Department officials. With regard to competency of post payment audit, it is stated that in terms of clause 51(2) the Railway reserves to itself the right to carry out the post payment audit and it is also stated that no instructions have been issued as alleged by the petitioner with regard to his acceptance/otherwise of the tenders. There is no base with regard to his allegation that some other contractors were also forced and the same is totally baseless and false. Further it is stated that in respect of agreement No.58/S/BZA/2004 dated 29-7-2004, payment was arranged to the contractor based on the three on account bills i.e., CC/I, CC/II and CC/III. The last on account bill i.e., CC/III for an amount of Rs.5.74 lakhs was passed on 29-4-2005. There is no bill pending in the Divisional Office pertaining to this contract. In respect to Agreement No.5/BZA/Central/2005 dated 19-1-2005, the measurements have been made by the Senior Section Engineer and the bill was sent to the Divisional Engineer on carrying out checking in Divisional Office and the bill was returned with observations to Asst.Divisional Engineer/Bapatla and the bill will be processed on attending observations. There is no base in the allegation of the petitioner that the measurements have not been taken in respect of Agreement No.34/DEN/East/BZA/05 dated 4-7-2005 and Agreement No.22/DEN/Central/2005 dated 24-6-2005. It is also stated that the petitioner had referred to work pertaining to catwalk tender No.27/East/BZA, finalization of the tenders shall be done by the Standing Tender Committee and the accepting authority at an appropriate level and that there is no substance*

*in the allegation that the respondents are not finalizing the same. Tender will be finalized by the railway in due priority. Further it is stated that in respect of other tender No.5/Bridges/2005, the contract was awarded to the petitioner on 24-5-2005 and that in terms of clause No.9 i.e., "Regulation for tenders and contractor for guidance of contractor for Civil Engineering Works", the agreement has to be executed by the contractor within 7 days, but till date the petitioner had not executed the same and that he was also advised to remit full security deposit of Rs.71,275/- but till date he has not done the same. Further in terms of clause 22 of Special conditions of Contract, the contractor has to engage an Engineering Diploma-holder separately for each contract work costing above Rs.5 lakhs and below Rs.15 lakhs and also stated that in the present case, the cost of the contract is Rs.12.75 lakhs and that the contractor till date has not engaged any engineering diploma-holder and he has not advised the Department regarding the engagement of the engineering diploma-holder. In view of the above, the contractor was also requested to execute the agreement, but till date there is no response from him. The work awarded in the present case is basically of repair in nature for which site details/measurements have to be jointly taken by the Field Engineers of the Department and the nominated engineering diploma-holder of the contractor. Since the contractor has failed to either nominate/depute an engineering diploma-holder till date, railways on their own have take the site details and advised the contractor vide letter*

*No.B/W.148/I/8214/WA/Bridges dated 22-7-2005. It is also further stated that it has been established by the nominated Committee of Officers in the presence of petitioner that over payment of Rs.6,01,248/- was made for the work actually not executed by him and also stated that as it is the public money, all the safeguards have to be taken to protect the same. Accordingly, an amount of Rs.26,082/- has been arrived towards interest on Rs.6,01,248/-. The demand for interest is not illegal. Since it is public money, which has to be handled with prudence, interest has to be charged at the rate of 18% per annum in terms of Engineering Code E-1264(e)(i) and the interest has been arrived at Rs.26,082/-. It is also further averred that in terms of clause No.52 and 52(a) of General Conditions of contract, Railways can withheld the payments if any due to him from any other contracts.* In such circumstances, the dismissal of the Writ Petition had been prayed for.

14. W.P.No.10481/2006 is filed praying for a Writ of Mandamus declaring that *the proceedings of the 2nd respondent in No.B/W.148/I/8095/WA/Co-ord, dated 12-4-2006 as illegal, improper, arbitrary without jurisdiction besides and consequently direct the respondent release the pending amount to the petitioner without withholding the amount of Rs.7,71,695/- from pending Bill payments of the petitioner and pass such other suitable orders.*

15. The impugned order dated 12-4-2006 reads as hereunder:-

SOUTH CENTRAL RAILWAY

DRM's Office,
Work Branch, Vijayawada.

No.B/W.148/I/8095/WA/Co-ord Dt.12-04-2006

To
Sri V.Balaji,
Railway Contractor,
Door No.2-283/3,
College Road,
Vuyyuru – 521 165.

Sir,

Sub:- Rayanapadu – Repairs to Sewage Pumping main from drainage Pump House to Septic Tanks along with Type-I Qrs.no.132 to 137 and Type-III Qrs.No.119 to 121 at WWS Colony/RYP. Agt.No.5/Sr.DEN/Co.ord/BZA/05, dt.4-1-05.

Ref: 1. This Office letter of even No.dt.30-5-05 and 27-1-06.

2. Your Letter No.NIL, dt.7-2-2006.

3. Hon'ble High Court of A.P., Hyderabad order in W.P.No.3020 of 2006 issued on 16-3-2006 and received in this office on 6-4-2006.

-: o0o :-

In compliance to the Orders of the Hon'ble High Court of Andhra Pradesh vide order cited under reference 3 and in reference to your letter under reference 2 the detailed and reasoned order is furnished under:

The above work was awarded to you for a total value of Rs.27,26,569/-. The final bill has been passed for this work including deviation amounting to Rs.39,13,580/- duly arranging payment to you. Post payment audit of the above work in terms of clause 51(2) of GCC was carried out by a Committee of Railway Officials consisting of Divisional Engineer/East/Vijayawada in the presence of Sri K.Venkateswara Rao, Senior Section Engineer/Works/Watering Arrangements/Rayanapadu and Sri B.Thimoti, Section Engineer/Works/BZA and yourself on 28-5-2005 and 29-5-2005. The proceedings of the Special Report were jointly signed by the railway officials and you. Based on the proceedings, it was established that approximately an amount of Rs.6,01,248/- was paid in excess for the work not executed by you. Accordingly,

you were requested to remit the amount vide this office letter of even number dt.30-5-2005 and you had remitted an amount of Rs.6,01,248/- vide DD.No.9617028, dated 31-5-2005.

In the Special Report jointly signed by Railway Officials and yourself, it is clearly stated that the exact length of the pipe line dismantled/excavated could not be ascertained immediately as it involved large scale digging and this aspect needs to be probed further to ascertain the fact. Further, it is to be brought to your notice that whenever any replacement of pipe line is done, it is the responsibility of the contractor to return the released materials to Railways i.e., to the concerned Railway Officials under remitted to Railways is approximate.

Enclosure to Lr.No.B/W148/I/8905/WA-Co.Ord., dt.12-4-2006.

| Sl. No | Items | Unit | Rate Rs. | Quantity Paid excess | Approx. Amount Paid excess |
|---|---|---|---|---|---|
| 1. | Supply and laying of CI Pipe 150 minimum dis (Item No.5 of Agt) | Mts | 941.30 | 30.86 | 29048.50 |
| 2. | Earth Work excavation for founds (Item No.1 of Agt) | Cum | 24.30 | 42.00 | 1020.60 |
| 3. | Earth Work wet excavation for founds (Item No.2 of Agt) | Cum | 11.00 | 22.22 | 244.2 |
| 4. | Supply, Stacking and filling clean sand (Item No.6 of Agt) | 205.40 | 68.00 | 1396.20 | 13967.20 |
| 5. | Providing lead joints for all CI 150 mm dia (Item No.7 of Agt) | 170-00 | 6.00 | 1020.00 | 1020.00 |
| | | | | | 45,300.72 |
| 99% | | 44,847.1 | | Contractors Percentage as per Agt (+) | |
| | | | | | 99,148.43 |

B. Cost of released material (CI Pipe) which were not handed over to the railways by the contractor Sri V.Balaji

| Sl. No. | Description | Length Released In Mts. | Weight Per Meter In Kgs. | Total Weight In Kgs. | Rate per Tonne in Rs. | Amount In Rs. |
|---|---|---|---|---|---|---|

| | | | | | | |
|---|---|---|---|---|---|---|
| 1. | CI Pipe 150 MM | 1545.35-60.50 mts available = 1484.85 | 30.60 | 148.85 X 30.60 = 4,45,436.41 | 15,000 | 6,81,546.15 |
| A. Total Value of excess payment 90,148.43 | | | | | | |
| B. Total Value of unreturned scrap material 6,91,546.15 | | | | | | |
| C. Total Additional amount to be recovered from agency 7,71,694.58 | | | | | | |

Later, the subject the probed into further by CBI Officials and based on the report of the investigation by the CBI Officials in the presence of Railway Officials and two other Central Government Officials as witness from 3-1-2006 to 10-1-2006 on the above work executed by you, it has been established that (a) the released CI Pipes/material for a length of 1484.85 m. was not returned by you to the Railway (b) Further, it was found that payment was made for certain items of works which were physically not executed by you and which were not figuring in the special report of the post payment audit of May, 2005. The Cost of (a) (b)works out to Rs.7,71,695/- (Rupees Seven lakhs, seventy one thousand and six hundred and ninety five only).

Therefore, you once again requested to remit an amount of Rs.7,71,695/- (Rupees Seven lakhs, seventy one thousand and six hundred and ninety five only) at the earliest to Railway in the form of DD/Money cash Receipt in favour of Senior Divisional Finance Manager, South Central Railway,Vijayawada chargeable to allocation 11-561-32 (Spending Unit – 05).

Encl: As above.

Yours faithfully,
Sd/-
Sr.Divisional Engineer/Co.ord.
For and on behalf of President of India

16. It is stated in the affidavit filed in support of the Writ Petition that *the petitioner had been executing Civil works of South Central Railway for the last 5 years, without any complaint from any quarter and the petitioner was included in the list of*

*Approved Contractors in Category B in 2004. Further it is stated that in June 2004, the 1st respondent had called for tenders relating to the work of repairs to sewage pumping main from drainage pump house to septic tanks along with Type-I Qrs.no.132 to 137 and Type-III Qrs.No.119 to 121 at W/WS/Railway Colony Rayanapadu and that the petitioner offered his tender on 21-7-2004 and also stated that that the 1st respondent had called for negotiations on 17-11-2004 and tender quotation mount was reduced during negotiations and that ultimately, the petitioner's tender was accepted by the proceedings No.B/W.496/I/4/T.81/DEN/I/2004/T.V. dt.30-11-04, and the agreement was executed on 4-1-2005. It is also stated that there are special and general conditions of contract binding both the parties and that the agreement period was three months with maintenance period of six months and that the actual work commenced on 4-2-2005. It is also averred that the petitioner had executed the entire work and extra work also as per the instruction of the departmental officials and that the final measurements were taken by the representatives of the 1st respondent i.e., Senior Section Engineer (Works)Rayanapadu. Further it is stated that after all the measurements were taken and certified in all respects only the final bill was approved and payments were made after due check measurements were made by the Asst.Divisional Engineer and Sr.Divisional Engineer Coordination. Further it is stated by the petitioner that to his surprise and annoyance, he was called to the office of the*

*3rd respondent on 29-5-2005 at about 8.00 p.m., by the 2nd respondent where he found respondents 3 and 4 Divisional Engineer East BSA and Section Engineer Works/BZA and he was asked to sign a special investigation report stating that there was some discrepancy regarding the work executed by him in laying the pipe line and there were some excess payments made and that he brought it to the notice of the respondents that he was not present when they have conducted inspection, no notice was given to him and he cannot be made responsible for the inspection made behind his back that too after the entire work was executed and certified by the Department officials. It is also averred that inspite of protest, the respondents and the other officials present have forced the petitioner to sign report stating that the recovery would be subject to further inspection etc., and that he had no other go to sign the report and pay the amount as demanded by them on the assurance that the matter would be only regarding excess payments and subject to further inspection. Further it is stated that after the receipt of amount the 2nd respondent had issued proceedings No.B/W/148/I/8095/WA Coord, dated 30-5-2005 received by the petitioner on 3-6-2005 calling upon him to pay an amount of Rs.6,01,248/- which has been paid in excess of the works executed by him and further it is stated that the amount is only provisional. It is also averred that an investigation has been done on the work entrusted to the petitioner by a Committee of Officers in his presence on 28-5-2005 and 29-5-2005 which is not correct and that the petitioner*

*was never given a notice of any appointment of any Committee or the socalled investigation by the Committee and that the petitioner was never present on 28-5-2005 or on 29-5-2005 at the time of any investigation. In fact, as per the General conditions of the contract (condition No.4) all notices and communications references and complaints made by the Railway or the Engineers representative or the Contractor, inters concerning the works shall be in writing and no notice communication reference or complaint not in writing shall be recognized. It is also stated that every step of the work i.e., measurement, certificates, payments etc., was governed by the General and Special conditions of the contract, in the case of the petitioner also entire process was carried out as per the conditions of the contract. Further it is stated that the proceedings of the respondents dated 30-5-2005 and the collection of money from the petitioner have been arbitrarily done and that the petitioner had filed W.P.No.14022/2005 on the file of this Court and in the said Writ Petition a counter affidavit was filed stating that the petitioner should have invoke arbitration as per clause 63 & 64 of General Conditions of the contract and also stated that immediately the petitioner had written to the respondents to refer the matter for arbitration by invoking clause No.63 & 64 of General Conditions of the contract but so far no action is taken to refer the matter to an arbitrator. The petitioner also further averred that to his surprise and annoyance, the 3rd respondent had issued proceedings No.B/W.148/1/8095/WA/CO.Ord. dated 27-1-2006 wherein it is*

*stated subsequent to the Collection of Rs.6,01,248/- and Rs.26,082/- as interest thereon verification of the same work has been done by the CBI Officials in the presence of Railway Officials and other witnesses from 3-1-2006 to 10-1-2006 and the petitioner was called upon to pay an amount of Rs.7,71,695/- towards unreturned released material under agreement No.5/SRDEN/Co.ord/BZA/05, dt.4-1-2005. The petitioner further stated that the scope of his contract does not include any retrieving of the material, so-called inspection was conducted behind his back and no report of inspection was supplied to him and also stated that he filed W.P.No.3020/06 before this Court and this Court was pleased to dispose of the said Writ Petition with a direction to the 1st respondent herein to pass a detailed and reasoned order within the time specified in the order and also further stated that though the 1st respondent did not pass any order within the stipulated, has communicated an order dt.12-4-2006 wherein the same demand has been confirmed by giving the same reason by repeating the contents of the counter. Further it is stated that a perusal of the proceedings dt.12-4-2006 indicate that no notice is given to the petitioner before fastening the liability of Rs.7,71,695/- and no inspection report was supplied. It is also stated that the so-called inspection was conducted in the absence of the petitioner and as to how the CBI Officials came into picture is not known and also further stated that basically the work which was mentioned in the proceedings is not at all part of contract work*

*and that the value of the released material is estimated at Rs.6,81,546-15 but the said item of work is not part of petitioner's agreement and also stated that there is no mention in the proceedings dt.12-4-2006 that return of released material covered by which part of the work. It is also averred that if the work of dismantling is entrusted, the question of returning the released material would arise, but when the agreement is only regarding laying pipeline, but not dismantling of any existing pipeline. It is also stated that dismantling of CI Pipe is not in the scope of petitioner's work and the same was done departmentally. Further it is stated that if the records relating to the said work of dismantling and laying of pipeline are called for, it would establish that dismantling of pipe is not part of the work entrusted to the petitioner and that no tender was called for, for the said work. There is prolonged Inter-Departmental correspondence on this aspect of work. It is further averred that except 8.4 meters of salt glazed pipe line, no other material was retrieved and the same was handed over to the concerned Engineer which reflected in the Bill and that the work executed by the petitioner is not replacement of Pipeline but it was laying of Pipeline as per new alignment decided by the Department after removing 8.4 meters Sale Gazed pipeline. It is also further stated that the facts can be verified from the final bill and deviation statement and that hence any demand on account of non-returning of retrieved material is illegal, improper, arbitrary, unsustainable, opposed to principles of natural justice besides being without jurisdiction. Further it is stated that regarding*

*excess payment made for unexecuted work also, it is stated that when there was inspection in May, 2005, the length of pipeline was 1576.21 meters whereas when the inspection made in January, 2006, it was only 1545.35. Further it is averred that it is relevant to note here that both the inspections were carried in the absence of the petitioner and that he cannot be fastened with liability of payment from time to time on the basis of enquiry/inspection conducted in his absence and also stated that that inspection cannot be carried out at regular intervals after the final bill is settled and guarantee period is over. Hence, the demand on this account also illegal, improper, arbitrary, without any authority of law besides being opposed to principles of natural justice.*

17. The impugned order already had been referred to supra.

18. The stand taken by the Railways is more or less similar even in this Writ Petition.

19. A reply affidavit had been filed enclosing certain material papers to demonstrate how the authorities had not arrived at correct conclusion in relation to the amounts in question. It is stated in para 2 that *contents of the para No.3 are absolutely incorrect except to the extent indicated therein. It is also stated that in reply to para 3 of the counter affidavit filed by the 2nd respondent on behalf of all the respondents, it is stated that the 2nd has come into adverse notice of his superiors and also stated that there are allegations against respondent No.2 of his misconduct, misappropriate etc., and that the respondent No.2 is hand-in-glove with one Mr.K.Venkateswara Rao, Section*

*Engineer, Works/WAP/RYP in Vijayawada Division. It is further stated that though the said Venkateswara Rao was transferred as early as on 30-4-2004 along with others, the second respondent did not relieve him and allowed him to continue, to perpetuate their collusive and illegal activities, to get themselves unlawfully enriched. Further it is stated that the contention of the respondent that the petitioner's work was verified through a Committee of Officers formed by Divisional Railway Manager, S.C.Railway, Vijayawada is utterly false and misleading and also stated that the D.R.M. stated in the notice dt.6-1-2006 that he had approved the proposal constituting a Committee of Officers by the respondent No.2 for verification of the work done by the petitioner under the supervision of respondent No.2 who is the Agreement Authority and who made payments for the entire work and also further stated that the fact of appointment of Committee of Officers for verification of petitioner's work was not at all informed to him by giving a notice to him and the said verification was done behind his back and his signature was obtained by coercion on 29-5-2005 night at about 8.00 p.m., by calling him over phone. The petitioner also stated that one contractor by name Y.B.G.Tilak witnessed the seen of obtaining petitioner's signature by coercion. It is also stated that the appointment of the Committee of Officers for verification of the work is not within the scope of the terms of Agreement and the General Conditions of contract or special conditions of contract. Further it is stated that the respondent No.2 had stated in his letter dt.30-5-2005 that a special report was drawn by a*

*Committee of Officers and named the verification as post payment Audit as per clause 51(2) of GCC in the counter affidavit filed on 13-7-2005 by respondent No.2 in W.P.No.14022/05. The proposal made by respondent No.2 to constitute a Committee of Officers who are his subordinates under his supervision with the approval of DRM and naming the same as post payment Audit so as to invoke clause 51(2) of GCC is invalid. Even assuming that the verification is done under clause 51(2) the contractor should be informed through a Notice. As per clause 4 of GCC "All notices and communications, references and complaints made by the Railway or the Engineers representative or the Contractor, interse concerning the works shall be in writing and no notice communication, reference or complaint not in writing shall be recognized." It is also stated by the petitioner that as already stated, his signature on the verification report was obtained by coercion and the amount collected arbitrarily. Further it is also stated that the contents of para 4 are absolutely incorrect except to the extent indicated therein. It is also stated that in reply to para 4 of the counter affidavit, the contention that the petitioner was present throughout the measurement on 28-5-2005 and 29-5-2005 is absolutely false and also stated that if really the petitioner was present on 28-5-2005 and 29-5-2005, they would have obtained his signatures at the time of measurements itself. Though there is clause 51(2) of GCC, the respondent had not done post payment Audit but named the alleged verification report afterwards as post payment Audit. Further it is stated that*

*it is false to state that the execution of work was done under the Direct Supervision of Senior Section Engineer/Works/WA/Rayanapadu and ADE, Buildings, Vijayawada and also further stated that the respondent No.2 is fully responsible as per clause 1117 of Indian Railways Code for Engineering Department for the entire execution of work and to the extent of check measurement and certification and payments. Further the petitioner averred that though he is not concerned, he submits that Sri K.Vekateswara Rao, SSE and Sri Satyanarayana who were suspended were not given any charge memos as to why they were suspended and also stated that he came to know that both Venkateshwar Rao and Satyanarayana were reinstated in service and also further stated that this itself will prove that the second respondent is doing this foul play pretending as he is not responsible. It is also further stated that the contents of para 5 are absolutely incorrect except to the extent indicated therein. In reply to para 5, the petitioner averred that clause 43(2) of GCC debarred the contractor from disputing the correctness of the items covered by "No Claim Certificate" on demanding a clearance to arbitration in respect thereof and also stated that the petitioner had signed No Claim Confirmation on the final bill and the final bill is paid and also further stated that there is no provision in GCC for Arbitration after signing No Clam Certificate. However, the petitioner had applied for arbitrator stating the facts of obtaining his signature by coercion on the verification report and collection of amount from the petitioner arbitrarily and having*

*received the application the respondent No.3 kept quiet without replying and also stated that his arbitration application can be deemed to have been accepted by the respondent No.3 and his claim of refund may be deemed as accepted by the respondents. It is also further stated that the contents of para 6 are absolutely incorrect except to the extent indicated therein. In reply to para 6, the petitioner states that he is not concerned with the so-called investigation by CBI Officials etc., and he is not responsible for any released material of CI pipe line removal as there was no such item of work except removal of 8.4 Mts. Sale Glazed pipe. It is stated that the contention of the respondent in stating that Item No.4 of Schedule-A where provision of dismantling has been incorporated is true but it was no C.I.Pipe and it can be seen from deviation statements that only 8.4 mtrs., sale glazed pipe line was removed and to that extent only bill was made. The deviation statement clearly shows that the existing damaged R.C.C. Pipe line is laid about below 3 Mtrs., below ground level and that hence pipeline alignment is diverted to over come problem and hence the deviation. It is also stated that the contention of respondent No.2 in stating that the released CI Pipeline has not been accounted for is false since thee is no such removal made by the petitioner. Further it is stated that the contention of respondent No.2 that whenever any replacement of pipeline is done, it is the responsibility of the contractor to return the released material to railways is nothing but twisting the facts. The petitioner further stated that he had not removed any*

*released material and his work is not replacement of pipe line as he was instructed by the concerned to lay the pipe line in a new alignment and therefore the question of removal of released material does not arise as can be seen from the approved Deviation Statement signed by the respondent No.2 etc. It is also stated by the petitioner that the question of demanding him to remit an amount of Rs.7,71,695/- towards unreturned released materials under Agt.No.5/Sr.DEN/Coord/BZA/05, dt.4-1-2005 does not arise and the respondent No.2 had made false claim which is not tenable and also stated that the respondent had not given any notice as per clause 4 of GCC. Further it is stated that the respondent No.2 claimed the amounts only to make the petitioner suffer by withholding the amounts and by instigating other DENs to hamper other works and consequently making huge loss to the petitioner in all respects. It is further averred that the main reason for manipulation of this illegal claim made by respondent No.2 is to get relief from the allegations made by Vigilance Department during August, 2005 that about Rs.30 lakhs worth of released underground old pipes and pipeline material worth about Rs.30 lakhs have been misappropriated. It is also stated by the petitioner that had it been a fact, he had not returned released material, the amount would have been deducted from the final bill itself and also stated that the so-called investigation made by CBI/Railway was made behind back without giving him any notice and that too after the maintenance period of the work is over. Further it is stated that the Agreement does not provide any clause for such*

*verification in instalments and respondent No.2 is not entitled to put false claim. Further in reply to paras 6 and 7, it is stated that the amounts are illegally withheld and there is no sum due to the railways and therefore the Writ Petition is maintainable. It is also stated that the contents of para 7 are absolutely incorrect except to the extent indicated therein. The petitioner further stated that the following amounts are due to him as detailed below:*

*1) Agt.No.57/BZA/C/2005, dt.19-1-2005 Rs.1,58,797/-*

*2) Agt.No.22/S/BZA/C/2004, dt.28-7-2004 Rs.1,15,224/-*

*3) Agt.No.05/N/BZA/C/2004, dt26-6-2006 Rs.2,63,173/-*

*4)Agt.No.95/N/BZA/C/2004, dt.27-9-2006 Rs. 48,799/-*

*5) Agt.No.Sr.DEN/W/BZA/2002,dt.19-9-02 Rs. 87,804 /-*

*Total Rs.7,73,797/-*

*It is also averred that as per Sr.Den./Coord/BZA vide note No.B/W/Coord/Confidential dt.27-1-2006 the amounts were said to have been deposited by the SR.DF.M/BZA which was informed to the petitioner vide his letter dt.31-7-2006. It is further stated that the Sr.DEN/Coord/BZA had acted against this Court order passed in W.P.No.3020/2006 wherein it was ordered to pass a detailed and reasons order. Further it is averred that the action of respondent No.2 in stopping the petitioner's payments and keeping the same under d deposit was arbitrary since there was no ascertained sum due to railways from the petitioner. It is stated that clause 52 of GCC has no application to the facts and circumstances of the case and such a clause which authorized withholding payments due to a contractor in respect of other*

*contract works itself is illegal, arbitrary and is liable to be set aside by this Court.*

20. It may be pertinent to have a glance at the order made in W.P.No.3020/2006 dt.16-3-2006 and the relevant portion of the Order reads as hereunder:-

> *"Petitioner's complaint is that in respect of the works under the agreement dt.4-1-2005, the 1st respondent is periodically intimating the petitioner that excess payments were made on one ground or the other and on the basis of such intimations, is withholding the amounts due to the petitioner under other contracts between the petitioner between the petitioner and the respondents. By the letter dated 27-1-2006, the 1st respondent states that when the "repairs of the sewage pumping main work" executed by the petitioner was inspected by the CBI officers during 3-1-2006 to 10-1-2006, an amount of Rs.7,71,695/- due from the petitioner to the Railways towards unreturned released material was discerned and that the petitioner should therefore arrange payment of the above amount at the earliest.*
>
> *The petitioner's complaint is that as and when some authority or other, including the CBI and at regular intervals, inspects the works done by the petitioner, the 1st respondent is coming up with instalments of demands and that all such demands for payment are outside the Agreement No.5/Sr.DEN/Coord/bza05, dt.4-1-2005.*
>
> *Sri P.Ganga Rami Reddy, learned Standing Counsel for the respondents, states that the petitioner submitted a representation dated 7-2-2006 responding to the impugned communication of the 1st respondent, denying the petitioner's liability to pay Rs.7,71,695/-.*
>
> *In the circumstances above, the 1st respondent is*

*required to pass a reasoned and detailed order as to the basis for the quantification and the liability itself, of the petitioner to the respondents under the agreement dated 4-1-2005. If such a detailed and reasoned order is communicated by the 1st respondent, the petitioner would be in a position to take appropriate remedies before the appropriate forum as the disputes in such an event would be disputes arising out of a non-statutory contract after the entering into of such a contract.*

*Further aforesaid reasons, the 1st respondent is directed to pass a detailed and reasoned order responding to the petitioner's response dated 7-2-2006 to his communication dated 27-1-2006, expeditiously and in any event, within a period of two weeks from the date of receipt of a copy of this order. The 1st respondent shall communicate the order to the petitioner within the aforesaid time.*

*The Writ Petition is disposed of. No order as to costs."*

21. As can be seen from the respective stands taken by the parties and also the impugned orders which had been referred to supra, as far as W.P.No.2236/06 is concerned, in the light of the subsequent events and in the light of the alternate situation, no positive directions can be given since it is a futile exercise. As far as the other two Writ Petitions are concerned, the respective stands taken by the parties, as reflected from the respective pleadings and also the contentions advanced, already had been specified above, several of the mathematical and arithmetical calculations and also the elaborate submissions made in relation to the violation of principles of

natural justice need not detain this Court any longer for the reason that these are all disputed questions of fact involved in relation to contracts. Strong reliance was placed on ***STATE OF JAMMU AND KASHMIR v. GHULAM MOHD.DAR AND ANOTHER***[1] wherein it was held that *it is well-settled that Writ of or in the nature of mandamus would not ordinarily issue for enforcing the terms and conditions of a contract qua contract and a Writ of Mandamus would issue when a question involving public law character arises for consideration.* In ***STATE OF U.P. v. BRIDGE & ROOF CO.(INDIA) LTD.***[2] at paras 15, 18 and 22 the Apex Court observed as hereunder:-

> *"In our opinion, the very remedy adopted by the respondent is misconceived. It is not entitled to any relief in these proceedings, i. e. in the writ petition filed by it. The High Court appears to be right in not pronouncing upon any of the several contentions raised in the writ petition by both the parties and in merely reiterating the effect of the order of the Deputy Commissioner made under the proviso to Section 8-D (1 )."*
>
> *Accordingly, it must be held that the writ petition filed by the respondent for the issuance of a writ of Mandamus restraining the Government from deducting or withholding a particular sum, which according to the respondent is payable to it under the contract, was wholly misconceived and was not maintainable in law. (See the decision of this Court in* ***Asst.Excise Commr. V. Isaac Peter ((1994) 4 SCC 104)*** *where the law on the subject has been discussed fully). The writ petition ought to have been dismissed on this ground alone.*
>
> *So far as the High Court' s direction to deduct at the rate of one percent is concerned, it may be a case*

*of stating the obvious, as contended by the appellants. But it must also be realised that more than that could not have been legitimately granted in a writ petition. It must also be noticed that the declaration granted is effective only for a limited period, i.e., 2/03/1995. It does not apply to payments made on or after 1/04/1995. What does it mean in the facts and circumstances of the case, we do not know. Whatever it means, it cannot certainly be construed as a direction to the appellants to pay over the said sum of Rs.82,24,969 to the respondent as claimed by it or as upholding the basis of the respondent's claim put forward in the writ petition."*

In ***KERALA STATE ELECTRICITY BOARD AND ANOTHER v. KURIEN E.KALATHIL AND OTHERS***[3] the Apex Court at para 11 observed as hereunder:-

*"A statute may expressly or impliedly confer power on a statutory body to enter into contracts in order to enable it to discharge its functions. Dispute arising out of the terms of such contracts or alleged breaches have to be settled by the ordinary principles of law of contract. The fact that one of the parties to the agreement is a statutory or public body will not of itself affect the principles to be applied. The disputes about the meaning of a covenant in a contract or its enforceability have to be determined according to the usual principles of the Contract Act. Every act of a statutory body need not necessarily involve an exercise of statutory power. Statutory bodies, like*

*private parties, have power to contract or deal with property. Such activities may not raise any issue of public law. In the present case, it has not been shown how the contract is statutory. The contract between the parties is in the realm of private law. It is not a statutory contract. The disputes relating to interpretation of the terms and conditions of such a contract could not have been agitated in a petition under Article 226 of the Constitution of India. That is a matter for adjudication by a civil Court or in arbitration if provided for in the contract. Whether any amount is due and if so, how much and refusal of the appellant to pay it is justified or not, are not the matters which could have been agitated and decided in a writ petition. The contractor should have been relegated to other remedies."*

Further strong reliance was placed on ***RADHAKRISHNA AGARWAL v. STATE OF BIHAR***[4] wherein the Apex Court the paras 9, 10 and 11 observed as hereunder:-

*"Dr. Singhvi's argument that the State Government had some special obligations attached to it would have appeared more plausible if it could be shown that the State or its officers or agents had practiced some discrimination against the petitioners-appellants at the very threshold or at the time of entry into the field of contract so as to exclude them from consideration when compared with others on any unreasonable or unsustainable ground struck by Art. 14 of the Constitution. It is true that Article 14 of the Constitution imports a limitation or imposes an*

*obligation upon the State's executive power under Art. 298 of the Constitution. All constitutional powers carry corresponding obligations with them. This is the rule of law which regulates the operation of organs of Government functioning under a Constitution. And, this is exactly what was meant to be laid down by this Court in Erusian Equipment and Chemicals Ltd. v. State of West Bengal, (1975) 2 SCR 674 at p. 677; (AIR 1975 SC 266 at p. 268) on which learned counsel for the appellants sought to rely strongly. It was held that (at page 677) (of SCR) : (at p.268 of AIR): "Under Art. 298 of the Constitution the Executive powers of the Union and the State shall extend to the carrying on of any trade and to the acquisition, holding and disposal of property and the making of contracts for any purpose. The State can carry on executive function by making a law or without making a law. The exercise of such powers and functions in trade by the State is subject to Part III of the Constitution. Article 14 speaks of equality before the law and equal protection of the laws. Equality of opportunity should apply to matters of public contracts. The State has the right to trade. The State has there the duty to observe equality. An ordinary individual can choose not to deal with any person. The Government cannot choose to exclude persons by discrimination. The order of blacklisting has the effect of depriving a person of equality of opportunity in the matter of public contract. A person who is on the approved list is unable to enter into advantageous relations with the Government because of the order of black-listing. A person who has been dealing with the Government in the matter of sale and purchase of materials has a legitimate interest or expectation. When the State acts to the prejudice of a person it has to be supported by legality. "*

*It is thus clear that the Erusian Equipment and*

*Chemicals Ltd's case (AIR 1975 SC 266) involved discrimination at the very threshold or at the time of entry into the field of consideration of persons with whom the Government could contract at all. At this stage, no doubt, the State Act purely in its executive capacity and is bound by the obligations which dealings of the State with the individual citizens import into every transaction entered into in exercise of its constitutional powers. But, after the State or its agents have entered into the field of ordinary contract, the relations are no longer governed by the constitutional provisions but by the legally valid contract which determines rights and obligations of the parties inter se. No question arises of violation of Art. 14 or of any other constitutional provision when the State or its agents, purporting to act within this field, perform any act. In this sphere, they can only claim rights conferred upon them by contract and are bound by the terms of the contract only unless some statute steps in and confers some special statutory power or obligation on the State in the contractual field which is apart from contract.*

*In the cases before us the contracts do not contain any statutory terms or obligations and no statutory power or obligation which could attract the application of Art. 14 of the Constitution is involved here. Even in cases where the question is of choice or consideration of competing claims before an entry into the field of contract facts have to be investigated and found before the question of a violation of Art. 14 could arise. If those facts are disputed and require assessment of evidence of the correctness of which can only be tested satisfactorily by taking detailed evidence, involving examination and cross-examination of witnesses, the case could not be conveniently or satisfactorily decided in proceedings under Art. 226 of the Constitution. Such proceedings*

*are summary proceedings reserved for extraordinary cases where the exceptional and what are described as, perhaps not quite accurately, "prerogative" powers of the Court are invoked. We are certain that the cases before us are not such in which powers under Art. 226 of the Constitution could be invoked."*

22. It is no doubt true that as per records produced before this Court, the decision to delete the petitioner from the list of contractors appears to be a prejudged one. Though the learned standing Counsel made certain submissions in this regard to justify the said action, this Court is of the considered opinion that having taken a decision, just formality of issuing a show cause notice may not cure the same. But, however, in the light of the subsequent change, let the writ petitioner make appropriate application to the competent authority and let the competent authority take appropriate decision in this regard in accordance with Law, in the light of the views expressed by this Court in this regard as above. As far as, the other two Writ Petitions W.P.No.s 14022/05 and 10481/06 are concerned, the writ petitioner is having a remedy of invoking either by arbitration clause or by proceeding to a competent civil Court. No doubt, certain submissions were made that after finalization of bills, there is no question of invoking arbitration clause. In the light of the request made by the writ petitioner and also in the light of the specific stand taken in the counter affidavits, the parties are conscious relating to invocation of arbitration clause for settlement of questions in controversy. When that being so, there may not be any impeachment to the writ petitioner in

invoking the said arbitration clause even in these matters. Certain submissions were made despite the directions given by this Court in W.P.No.3020/2006, the directions had not been complied with. This Court had thoroughly gone through the records produced before this Court and this Court is satisfied that all these questions are seriously disputed and controversial questions between the parties and such questions cannot be effectively adjudicated by a Writ Court. The minute details which had been demonstrated before this Court need not be gone into by this Court as a Writ Court since these are disputed questions of fact and all these questions are left open giving liberty to the petitioner to agitate all these questions before the appropriate forum. Hence, liberty is given to the writ petitioner to agitate his rights in accordance with law, in the light of the observations made supra.

23. In the light of the same, W.P.No.2236/2006 is disposed of giving liberty to the writ petitioner to make appropriate application to the competent authority relating to his non-listing as a contractor and let the competent authority take appropriate decision at the earliest point of time, preferably within a period of three months from the date of receipt of a copy of this order and let the writ petitioner also make a representation for the refund of Rs.75,000/- which is not in controversy and let the competent authority take an appropriate decision in this regard within a period of three months from the date of receipt of a copy of this order. W.P.No.2236/2006 is disposed of accordingly. Likewise, let the writ petitioner invoke the other legal remedies available to

him in accordance with law and except making this observation, no further positive directions can be given in W.P.Nos.14022/2005 and 10481/2006.

24. Accordingly, with the above observations, these Writ Petitions also are disposed of. The parties to bear their own costs.

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Justice P.S.Narayana

December, 2007

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[1] (2004) 12 SCC 327
[2] (1996) 6 SCC 22
[3] (2000) 6 SCC 293
[4] AIR 1977 S.C., 1496